TABLE OF AUTHORITIES

CASES

OTHER

IN THE

Supreme Court of the United States

TERM, 1971

NO. 70-40

MARY DOE; Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Susanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver; residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Appellants,

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

PETITION FOR REHEARING

COME NOW the Appellees herein and petition this Honorable Court for a rehearing in the above-styled cause which was decided on January 22, 1973. The reasons therefor are given below.

REASONS FOR GRANTING REHEARING

1.

Appellees have had no opportunity to show at what gestational stage the State interest in guarding the health of the mother warrants state regulation of abortion.

The abortion techniques used today are of relatively recent origin in medical practice and are not yet widely used outside of those states which liberally allow abortions. The Court has recognized that the State has a compelling interest in the health of the mother, and it selected the end of the first trimester as the point at which the State's interest may constitutionally be implemented. The single factor which the Court used to prohibit the states, as a constitutional matter, from exercising their concern with maternal health in the first trimester of pregnancy, was the maternal mortality rate (*Roe v. Wade*, No. 70-18, Slip Opinion, p. 47). The pivot is the judicially recognized "fact" that "mortality in abortion is less than mortality in normal childbirth." Even if this is true, it amounts to the Court choosing *sua sponte* a single medical comparative gauge of which to take judicial notice, without considering whether that "fact" is a matter of common knowledge, generally known and accepted, and without taking into account other medical and scientific facts which may justify State regulation of abortion or even cast a duty on the State to circumscribe such procedures for the health, safety, and welfare of pregnant women.

The point is that the Appellees had no opportunity at any stage in this case to present evidence which would show that the State's regulatory scheme regarding abortion is reasonably related to, and even demanded by hazards to, maternal health in the first trimester. The mor-

tality rate is not the only significant factor in assuring protection of maternal health. Just as the Court found too narrow the allowance of abortions to preserve the mother's "life" and ruled that her health also be served in the abortion decision, so the Court has overlooked the State's concern with her health both *within* the early stages of pregnancy and *afterwards* as she experiences the results of first trimester abortion; in these regards the State is concerned with a great deal more than just whether she lives or dies as a direct and immediate result of abortion. Hence, the exclusive emphasis on mortality constricts the legitimate arena of State concern with maternal health to the question only of life and death.

For example, Appellees should have the right to show that the State can require abortions to be done in a safe setting and to prescribe the location in terms of what is desirable to protect the patient, over and above what a lone doctor feels is adequate or expeditious. We are dealing here with a procedure long considered outlawed and which has suddenly become legal. Complications both immediate and long term are highly speculative, and the need for post-care availability is often unforeseen and unforeseeable. Later complications and the effects on the physical and mental well-being of the pregnant woman who undergoes an abortion procedure will not be known absent enforceable reporting procedures. Secondly, they will be beyond the State's reach to safeguard against if the State is constitutionally forbidden from restricting early-term abortions but for the minimal requirement that they be done by physicians.

The record is devoid of evidence as to what is justifiable in this respect, as to what is "reasonably related" to the compelling state interest recognized by the Court

and contemporaneously captured in the Court's judicial concept of medical wisdom and knowledge.

2.

Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" *medically;* in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.

The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion and compromising dichotomy of constitutional stages of fetal growth. With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.

The Constitution does not prohibit the State from exerting the power to protect rights retained by the people, that is, the right to determine for legal purposes what is a "person" insofar as the gray area of prenatal life is concerned. Nor does it prohibit the State from determining at what degree a living human entity may be protected on behalf of itself and of society.

Basic rights are the original and inviolate property of the people, flowing from natural law, whereas constitutions are only the mechanical means of organizing a government and thus merely guarantee and recognize such fundamental rights. The right of a living human fetus to develop to birth, which right cannot be said to attach constitutionally no sooner than "viability" as that term is judicially defined, is a natural right which exists even without a Constitution.

The Court has recognized that fetal life is a continuum. Thus before a point is selected at which our government by judicial fiat must be blindfolded to its existence, the Court should have every benefit of a complete record and the representation by a guardian ad litem for that fetal entity and for its natural right to develop to birth. The presumption in this regard should be on the side of life so that its fullest defenses may be aired.

What the Court has done is to compel the State to condone the killing of prenatal infants and even to encourage it by loose controls. The Court, but not the Constitution, compels the State to denounce the fetus for what it is, despite the legal status and recognition which the State accords to the prenatal infant in a wide variety of laws which conceive of a child *en ventre sa mere* as a child *in esse*.

The Court has adjudged that the State can protect the human fetus only when it "presumably has the capability of meaningful life outside the mother's womb." *Roe v. Wade*, No. 70-18, Slip Opinion p. 48. Medically, however, the fetus may be a patient whose life is sought to be saved at a point far earlier than "viability" and indeed, from the time his existence in the mother's womb is

known. The separate human entity is protectible from the earliest knowledge of pregnancy, by treatment to the fetus-harboring female so as to make her pregnancy as durable as possible.[1] The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability", as that term is defined by the Court, do the people of a state have the authority to demand caution before a prenatal infant is destroyed. Not only did the Court set a new constitutional standard, but at the same moment the Court applied the standard without giving Appellees notice or an opportunity to present evidence with respect to the point of gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones. Without medical testimony, for example, the Court abandoned the concept of "quickening" as being a valid point of recognition of the fetus as a separate and protectible entity.[2]

The Court's phrase "potential human life" should also be subject to medical scrutiny if it is to have a judicial meaning in medical spheres. In the medical concept of "life", with its current body of technological knowledge,

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[1] See Ratner, "Fetology: the Smallest Patients", Vol. 8, No. 2, *Child and Family Quarterly* (Oak Park, Illinois), reprint of article in "The Sciences" October 1968, New York Academy of Sciences.

[2] Mr. Justice Douglas would apparently recognize this earlier event. In speaking of the "rightful concern of society," he stated in his concurring opinion that: "The woman's health is part of that concern; as is the life of the fetus after quickening." *Roe v. Wade*, No. 70-18, and *Doe v. Bolton*, No. 70-40, concurring opinion p. 7.

including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence. The "potential human life" concept is questionable, for example, because the healthy first trimester fetus has a high *probability* of birth rather than merely a "potentiality."

In this regard, the records in some of the other cases pending before the Court may have more complete records which shed greater light on this momentous question than does the meager record in the instant case, made by a solitary hearing of less than three hours duration. See, *e.g.*, *Abele v. Markle*, 342 F.Supp. 800 (Conn. 1972), appeal pending; *Abele v. Markle*, ____ F.Supp. ____ (Conn. Sept. 20, 1972), appeal pending.

In addition, Georgia's recognition of meaningful life has already been legally determined to attach far earlier than the Court-established "viability" of twenty-four weeks or twenty-eight weeks. An example is the case of *Garrett v. State*, 125 Ga. App. 743 (1972), wherein the court upheld a judgment granting weekly child support for an unborn child, separate and apart from a lump sum payment to the pregnant wife. The court discussed the defendant's obligation to support his *children*. Illustrative also is the legal definition in Georgia of a "live birth", which birth requires a certificate of birth registration:

> "The complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes or shows any other evidence of life such as beating of the heart, pulsation

> of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached." Ga.L. 1964, pp. 499, 581, 584 (Ga. Code Ann. § 88-1702[e]; § 88-1709[a]).

This is obviously not related only to a point exceeding "viability". See also the examples referred to in Appellees' Brief, pp. 62-65, and in Appellees' list of "Late Authorities", pp. 2-3.

At any rate, the Appellees should have an opportunity to present evidence and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.

3.

"Person" is not defined in the United States Constitution, which this Court has repeatedly recognized as a dynamic document. In *Shadwick v. Tampa*, 407 U.S. 345 (1972), Mr. Justice Powell stated:

> "But our federal system warns of converting desirable practices into constitutional commandments. It recognizes in plural and diverse state activity one key to national innovativeness and vitality." *Id.* at 353-354.

Medical technology and biological knowledge have advanced far beyond that which existed when the Constitution was written. The Constitution did not freeze into 1789 concepts the meaning of "person" or the stage at which the people might be persuaded to protect fetal life.

4.

The Court has overlooked the State's compelling interest in protecting the dignity of human life, which is separate and apart from the interest in protecting the individual fetus. The State has a compelling interest as part of its police power to uphold and bear witness to the moral fiber of its citizenry. As Oliver Wendell Holmes is reported to have said:

> "The law is the witness and external deposit of our moral life."[1]

The Court here made a value judgment which should be left to the people through their duly elected representatives or even, where they so choose, through referendum. The interest in protecting the concept of the sacredness of human life and the natural rights which follow its emergence, underlies the interest in protecting fetal life and is at the root of the State's expressed desire to curb killing. This fundamental consideration is the basis for the conservative system of checks and the multiple consideration of the abortion decision which the Georgia statutory scheme envisioned, because it recognized that medicine was not here dealing with an appendix or other part of a person's body but rather with a separate and to a great degree independent human entity.

The concept that the entity was a part of the mother was long ago abandoned by science; it is undeniable that the entity is merely harbored in the mother who carries it. Certainly it is dependent on her, but dependence is relative and cannot be used to measure the value of human

[1] Law Window, National Cathedral, Washington, D.C.

life nor to determine when "life" begins. A born infant, for example, is utterly dependent and would die if not cared for. Our astronauts would similarly die if not tied by their "umbilical cord" to the life-sustaining moonship or oxygen supply. Each individual needs a particular type of environment for its existence, and the unborn infant needs the environment supplied by the mother's womb (or an artificial womb when that becomes available), and this need should not be required to subordinate the living fetus in all cases where the mother's broadly defined "health" is involved.

The people of the State of Georgia have made a value judgment based on medical and other scientific facts as well as a number of other legitimate factors which relate to the concept of human life. The State has balanced the interest of the non-wanting *pregnant* mother and the natural rights of the human fetus whose dependence may find a substitute at birth, and has through its legislation achieved a balance which gives credence and standing to both, in a humane and entirely workable scheme. The interest of the State in protecting maternal mental and physical health and life, and on the other hand its interest in protecting existing human fetuses who are within the realm of legitimate control, have been struck in a delicate balance which takes into account not only abortion laws but also adoption laws, child care laws, public health capabilities, etc. The Court's substituted value judgment should not, therefore, be foisted upon the people of the State without an opportunity at least to give evidence of the factual basis supporting their legislative efforts to strike the balance as they have done.

5.

The decision fails to allow the State to acknowledge the interests of the unborn fetus at any stage before birth.

The Court stated that the interest of the State in protecting fetal life is lawful at and after "viability." But the qualifier swallows up the concession and renders it substantially identical to the unregulated decision in the first trimester. The Court announced that:

> "If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother." *Roe v. Wade*, No. 70-18, Slip Opinion, p. 48.

The "health" of the mother comports a broad spectrum of considerations, as the Court adopted the many-faceted approach of the District Court and related it to the wide concept of "health" approved in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971). (See *Doe v. Bolton*, No. 70-40, Slip Opinion p. 11). Consequently, the 38-week-old fetus, who could live outside of his mother's womb without so much as the aid of an incubator, may be destroyed if his mother's mental health would better be "preserved" without the "psychological" experience of childbirth or the "distress" associated with an "unwanted" child. (See *Roe v. Wade*, No. 70-18, Slip Opinion, p. 38). Not only does this completely avoid the alternative of adoption, it demonstrates the overbroad restriction which the Court's mandate fixes on the State. Because of the all-consuming exception, the unborn "viable" child is no better off, as a matter of law, than the first-trimester child who can be aborted if his mother's physician deems that it is necessary for her, in his best clinical judgment. She,

being the sole patient with whom he is concerned, will be hard put to find that her "health" will not in some measure be affected if her desire to abort is not fulfilled.

The dilemma posed by this conflict should be resolved upon rehearing or remand.

CONCLUSION

For any or all of the reasons stated, this Petition for Rehearing should be granted, or the opinion should be withdrawn until the Court has fully examined those cases pending before it which come with more complete factual records, or the case should be remanded for the taking of evidence in light of the Court's views.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that this Petition is presented in good faith and not for delay.

DOROTHY T. BEASLEY

CERTIFICATE OF SERVICE

I, DOROTHY T. BEASLEY, Attorney of Record for Appellee Arthur K. Bolton, and a member of the Bar of the Supreme Court of the United States, hereby certify that on behalf of all Appellees and in accordance with the Rules of the Supreme Court of the United States, I served the foregoing "Petition for Rehearing" on the Appellants by depositing copies of the same in a United States mail-box, with first class postage prepaid, addressed to counsel of record at their post office address:

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This ____ day of February, 1973.

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